ABDUL HAI BIN HAJI MASUD AHMAD

v.

KWANG YUET SONG (F)

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J
[CIVIL SUIT NO. 420 OF 1979]
3 OCTOBER 1994

LANDLORD & TENANT: *Rent controlled premises - Whether plaintiff a protected tenant - Fixed term tenancy agreement - Whether comes within the purview of the Control of Rent Act - Allegation of fraud - Standard of proof required.*

EVIDENCE: *Written tenancy agreement - Whether oral terms to vary agreement admissible.*

The defendant is the proprietor of premises No. 14 Straight Street, Bukit Mertajam, Province Wellesley (said premises). She leased the said premises to the plaintiff for a fixed term of 10 years with effect from 1 November 1969 until 31 October 1979 under a written agreement dated 26 November 1969 which was annexed to a Form 15A (P4) and the said lease was duly registered at the Land Office. Upon expiry of the said lease, the defendant terminated the lease by notice to quit dated 19 May 1979, duly received by the plaintiff requiring him to quit and deliver up vacant possession of the said premises on or before 31 October 1979. However the plaintiff refused to quit and grant vacant possession of the said premises. The plaintiff contended that the defendant had orally agreed to give him a 20 years term of lease commencing from 1 November 1969 and terminating on 31 October 1989 and after the expiry of the 20 years the plaintiff could continue to be a monthly tenant of the said premises as long as the plaintiff wished.

The defendant filed a civil suit in the Magistrates Court at Georgetwon, Penang against the plaintiff for vacant possession and mesne profit. The plaintiff filed the present suit claiming *inter alia*, a declaration that he was entitled to a lease for a further term of 10 years commencing from 1 November 1979 to 31 October 1989 from the defendant with a monthly tenancy thereafter. He also contended that the defendants claim was bad in law as the said premises was governed by the Control of Rent Act, 1966.

Held:

[1] The alleged further (second) 10 year lease and the monthly tenancy thereafter was an unadultrated fabrication by the plaintiff in order to hold on to the occupation of the premises beyong the fixed term of 10 years lease that he had agreed to. On the evidence made available and on the balance of probabilities, neither on 6 August 1969 not at any time thereafter, did the defendant make any oral promise to grant the plaintiff any term of lease that was in excess of the terms stated in the written agreeemnt and P4.

[2] The parties here had consented to have their tenancy agreement being reduced to the form of a document and registered as required by s. 221 of the National Land Code 1965 (for being a tenancy of more than 3 years). Thus the plaintiff's oral evidence to vary the terms of the written (tenancy) agreement and P4 is clearly not admissible as it falls foul of the provisions of ss. 91 & 92 of the Evidence Act.

[3] In a tenancy agreement where its duration is clearly stated, the incorporation of a covenant to hand over vacant possession upon its determination by effluxion of time is not strictly essential and its absence is not fatal because in any event a lease where the duration is so clearly - nay precisely - stated, obliges the tenant to give up vacant possession of the premises upon expiry of the period that he had bargaining for; he is clearly estopped by contract from claiming that the term granted to him is longer than the actual term that he had agreed to.

[4] An occuppant of a controlled premises would be able to claim protection though not being a statutory tenant, but on the grounds that he has not being served with a certificate of decontrol under s. 24(2) of the Act, if - and only if - after the expiry of a fixed term tenancy period, the landlord had accepted any rent from such occupant while the premises remained controlled promises. As such, until the landlord commits the act of accepting the tenant after the expiry of the fixed tenancy period, the tenant is estopped by force of contract, from contending that his fixed period of tenancy has not been determined and he could continue to be in occuppation. The contract which he had voluntarily entered into is binding upon him *in personam* whereas the service (not strictly essential) of the certificate of decontrol on him - should he still continue to occupy the premises - is only a procedure afecting the premises *in rem*. To put it rather bluntly, he only assumes the role of a mere post box - so as to say - and nothing more, for the purpose of the landlord's application to convert a controlled premises to that of a decontrolled premises under s. 24(2) of the Act.

[5] In the current case, not only did the defendant refuse to accept any rental after the determination of the fixed term tenancy of 10 years - and as a result no new tenancy had been created but the plaintiff's tendering of rent to the defendant in the form of cheques is in any event not good tender, in the absence of an agreement to that effect, even if there had been previous acceptance of cheques by the defendant in payment. No fresh tenancy had been created after the expiry of the fixed period of 10 years, and the plaintiff could not claim any protection under the Act.

[6] The plaintiff had alleged that there was fraud in that the defendant by having accepted RM10,000 cash payment, and knowing that under the terms of the (alleged) oral tenancy agreement the plaintiff had a further ten (10) years lease and more to run, she had nevertheless devised a scheme to refuse to grant the further term as agreed, by contending that there was no oral agreement to this effect. This allegation, couched as it is in a peculiar and convoluted manner, does not even come anywhere near to constitute an allegation of fraud. It therefore does not merit consideration. Further, the sum total of the allegation contained merely a general allegation of fraud and the pleadings stand mute as to the circumstances relied upon as constituting the alleged fraud. A general allegation of fraud is insufficient even to amount to an averment of fraud of the kind that the Court ought to take notice of.

[Plaintiff's claim dismissed. Defendant's action in the lower Court allowed]

Cases referred to:

Subramaniam v. Retnam [1966] 1 MLJ 177 ***(refd)***
John Pym v. Robert Campbell & Ors. [1856] 119 BR 903 ***(refd)***
Tyagarajah Mudaliar v. Vedathnni [1936] MLJ 79 PC ***(foll)***
Arrale v. Costlin Civil Engineer [1976] 1 Lloyd's Rep 98 ***(refd)***
The Karen Oltmann [1976] 2 Lloyds Rep 708 ***(refd)***
Voo Min En & Ors. v. Leong Chung Fatt [1982] 2 MLJ 241 ***(refd)***
Leong Can & Ors. v. Tan Chong Motor Co. Ltd [1969] 2 MLJ 9 ***(refd)***
United Malayan Banking Corp. Bhd. v. Tan Lian Keng & Ors. [1990] 1 MLJ 280 ***(refd)***

Low Kam Yuen v. Teh Kim Huah [1979] 1 MLJ 83 ***(refd)***
Soong Ah Chow & Anor. v. Lai Kok Cheng [1984] 1 CLJ 152 ***(foll)***
United India Fire and Genral Insurance v. Jeffnese Cooperative Society [1971] 1 MLJ 118 ***(refd)***
Ramasamy Pillai v. Meyappan Chettiar [1955] 21 MLJ ***(refd)***
Syed Ahmad Al-Junied & Ors. v. Reshty [1960] 1 MLJ PC ***(refd)***
Hong Kong and Shanghai Banking Corporation Ipoh v. Rent Tribunal for Ulu Kirta abd Ors. [1972] 1 MLJ 70 ***(foll)***
H. Mohamed Salleh v. Ang Chan Siong [1949] 15 MLJ 35 ***(foll)***
Nahar Singh v. Pang Hon Chin [1986] 2 MLJ 141 ***(refd)***
Chu Choon Moi v. Ngan Sew Tin [1986] 1 MLJ 34 ***(refd)***
Tai Lee Finance v. Official Assignee & Ors. [1983] 1 MLJ 81 ***(refd)***
Walmiha Sawmilling Co. Ltd. v. Waione Timber Company Ltd. [1926] Ac. 101 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92
Control of Rent Act 1966 ss. 16, 24
National Land Code 1965, s. 221

For the plaintiff - R.K. Sharma; M/s. Sharma & Co.
For the defendant - Petra B.A. Oon; M/s. Lim, Lim & Oon

JUDGMENT

Vincent Ng Kim Khoay J:

On 14 November 1979, Madam Kwang Yuet Song (f) (the defendant in this suit), the proprietor of a premises bearing address No. 14 Straight Street, Bukit Mertajam, Province Wellesley (the said premises) filed a claim dated 13 November 1979 in the Magistrate's Court at Georgetown, Penang under Civil Action No. 1009/79 (the Action) against her tenant one named Encik Abdul Hai bin Haji Masud Ahmad (the plaintiff in this suit) claiming vacant possession of the said premises, mesne profits at the rate of RM400 per mensem from 1 November 1979 until the date of surrender of vacant possession and costs. In her Action the defendant averred that the said premises was leased to the plaintiff at a monthly rental of RM200 for a fixed term of 10 years with effect from 1 November 1969 until 31 October 1979 (the fixed term lease) under a written agreement dated 26 November 1969 for the fixed term lease entered into between them (written agreement) annexed to a NLC Form 15A (Exh.P4) which, as agreed, was duly registered in the Land Office, Penang vide Presentation No. 1114, Jilid 15 Folio 91 pursuant to s. 221 of the National Land Code, 1965. She further averred that the said fixed term lease was terminated by a notice to quit dated 19 May 1979 (P12), duly received by plaintiff, requiring him to quit and deliver up vacant possession of the said premises on or before 31 October 1979 i.e. at the end of the 10 years period in the lease. It was the plaintiff's contention in his defence in the action that sometime during the month of August 1969, before the written agreement for the fixed term lease was entered into, Madam Kwang had, in consideration of the receipt of a refundable deposit of the sum of RM10,000 - orally agreed to give him a 20 year term of lease commencing from 1 November 1969 and terminating on 31 October 1989 (oral agreement) in two separate ten year leases in writing to be registered under the provisions of the National Land Code. He alleged that the second 10 year lease was agreed to be given to him in consideration of the RM10,000 deposit not being recalled or refunded to him. He also contended that the claim was bad in law as the said premises was governed by the Control of Rent Act, 1966.

Then, on 5 March 1980, following his generally endorsed writ dated 22 October 1979 under the above civil suit (this suit), the plaintiff filed a statement of claim, claiming *inter alia*, a declaration that he was entitled to a lease for a further term of 10 years commencing from

1 November 1979 to 31 October 1989 from the defendant registrable under the National Land Code by virtue of and pursuant to the terms of the said alleged oral agreement, and for other consequential reliefs. The averments in his statement of claim in this suit and his Defence in the Action are similar.

This suit and the Action were subsequently consolidated by Order of High Court dated 1 June 1981. It is pertinent to note here that in both the Plaintiff's statement of claim in this suit and his defence in the Action the plaintiff had pleaded in no uncertain terms that the period of tenancy in the alleged oral agreement was 20 years in two equal periods commencing from 1 November 1969 and terminating on 31 October 1989, whereas it was only on 20 April 1993 that the plaintiff (vide a summons in chambers of even date through his present Counsel Mr Sharma) belatedly sought and obtained leave of Court (on 11 April 1994) to amend his statement of claim to further plead that the defendant had also promised, in the alleged oral agreement, to grant him a continuing monthly tenancy after the expiry of the alleged aggregate 20 years lease of the said premises. The amendment reads:

> It was further agreed that after the expiry of the said leases for a total period of 20 years, the plaintiff would continue to be a monthly tenant of the said shop (premises) at the rent then payable so long as he wished and carried on business thereat on terms that:
>
> (1) plaintiff continued the deposit of RM10,000 to be maintained with the defendant free of interest.
>
> (2) plaintiff claims no reimbursements for repairs done to the premises initially or subsequently during monthly tenancy and continued paying rent then payable.

It is also pertinent to note that though the defendant commenced the said Action in the Magistrates' Court immediately upon expiry of the fixed term lease, the two consolidated cases took a period of over 14 years before it came up for the current hearing. Thus, even at the highest watermark of the plaintiff's claim that the defendant had orally promised to give him an aggregate term of 20 years lease with effect from 1 November 1969, the alleged 20 years lease would, in any event have expired in November 1989 i.e. around 4 years before the trial of this matter.

At the commencement of the trial, the Agreed Bundle was marked as "AB", Disagreed Bundle as "DAB", the Supplementary Disagreed Bundle as "DABS" and the agreed facts as "AF". The following were the agreed facts:

1. The defendant is the registered proprietress of all that piece of land comprised in Lot 815 Mukim 10 Seberang Perai Tengah whereupon an old premises No.14 Jalan Besar, Bukit Mertajam is situated. The land and premises are herein called the said shop.
2. The said shop is within the ambit of the Control of Rent Act, 1966.
3. The monthly rent of the said shop is RM200.
4. Since 1 November, 1979 the defendant has not accepted the rent of Two hundred ringgit a month.

Besides calling a witness one named Lim Lye Soon concerning certain repairs the plaintiff had done on the roof of the said premises, only the plaintiff gave evidence on his own behalf, and the defendant's case comprise only her own oral testimony. The plaintiff, aged 47, was a businessman dealing with textiles as a wholesaler and a retailer. The part of the plaintiff's evidence that is material to the issues raised is as follows.

On 6 August 1969 the plaintiff and one Kim Seng went to the defendant's said premises and asked her whether she wanted to let out her premises. She said yes and that she was willing to let out the whole of the said premises to the plaintiff at a rental of RM200 per mensem. The plaintiff then told the defendant that he required the said premises "on a monthly basis for a long term and for so long as he carried on with his business." And the defendant said that if the plaintiff required a long term lease he would have to pay her RM10,000 as deposit. He asked her to reduce but she refused. Because he needed the premises he agreed to pay the sum demanded. As requested, he paid RM1,000 that day to the defendant (receipted under receipt marked Exh.P3) as deposit pending execution of the written (tenancy) agreement. The defendant was then doing business and she needed time to vacate. He was to pay the defendant the balance RM9,000 on 1 December 1969 upon execution of a proper tenancy agreement. The tenancy period was then agreed to commence on 1 January 1970. Most importantly, he testified that on 6 August 1969, he and the defendant had also orally agreed as follows:

(a) The plaintiff was to pay a sum of RM10,000 to the defendant as deposit in two instalments i.e. RM1,000 and RM9,000 as aforesaid.

(b) The plaintiff was not to sublet the said premises.

(c) The plaintiff had to pay all outgoings in respect of the said premises except the quit rents and assessments.

(d) The plaintiff was not to remove the defendant's signboard but the plaintiff could put up his own signboard on the left side.

(e) The plaintiff was to bear all repair expenses as long as he occupied the said premises.

(f) The payment of RM10,000 was not to be mentioned in the agreement to be signed.

(g) The defendant was to give a lease of 10 years w.e.f. 1 January 1970 as the initial period and thereafter a further ten (10) years followed by a monthly tenancy after the expiry of 20 years.

He further said that when he enquired about the necessity for condition (g) and in those terms, she explained that the title of the said premises was charged to her brother and condition (g) was only meant to secure his consent as chargee. And the said deposit of RM10,000 was not to be mentioned in the agreement as the chargee might lay claim to same. She asked the plaintiff to trust her and he did. She also agreed to give the plaintiff the first option to purchase the said premises should she be so minded to sell. The defendant had also told him that the chargee would not agree to her giving a monthly tenancy on the said premises but only to a 10 year lease.

Subsequently, at his request, due to the approaching puasa month, the defendant allowed him earlier to enter into and commence the tenancy of the premises w.e.f. 1 November 1969, which he did after spending over RM500 on cleaning up and repairs. Thus the effective date of tenancy was 1 November 1969 as reflected in P4 and the written agreement and not 1 January 1970. P4 and the written agreement were prepared by the defendant's own solicitors under her instructions, though he was aware of and had noted the 10 year period in the written agreement before he signed it. He had nevertheless trusted her to keep the terms of the oral agreement. He admitted receipt of a notice to vacate dated 19 May 1979 from the defendants's former solicitors (Exh. P12) requiring him to quit and deliver up vacant possession of the said premises on or before 31 October 1979. He acknowledged that though he had tendered rent by cheques to the defendant, she had not cashed any of the cheques since 1 November 1979 until trial.

In cross-examination the plaintiff said "On 6 August 1989 I was aware that the said premises was a controlled premises but yet I insisted on a written agreement because as a business-man I had wanted to feel secure. It was not that I trusted the defendant but she asked me to trust her. I personally do not trust her." He admitted that the statement of claim dated 5 March 1980, which was drafted on his instructions to his solicitors, contained no mention of the alleged oral promise of a further monthly tenancy to continue after expiry of 20 years lease.

He agreed that the affidavit dated 19 April 1993 supporting his application for leave to amend his statement of claim, to include the question of monthly tenancy, was affirmed over 4 years after the 20 year period had expired. He further agreed that the written agreement and P4 was explained to him by the lawyer before he signed them, and he understood the terms and conditions stated therein, but he had believed the said oral assurance of the defendant in the oral agreement.

That concluded the case for the plaintiff.

Then, the defendant, a housewife, age 66 years old, gave evidence on her own behalf and testified as follows.

She first intended to let out the said premises in 1969. She was then running a tailoring business in the said premises. As her children were then going to Kuala Lumpur to pursue their education she had to move down to Kuala Lumpur to take care of them and decided to suspend her tailoring business, but not permanently as she had intended to reopen same when she returned to Bukit Mertajam upon the expiry of the lease on the said premises that she was to give. The plaintiff himself approached her in July or August 1969 for a lease on the said premises and told her that he wanted a lease of 10 years and he was prepared to give her RM10,000 to secure such fixed term lease to be registered against the title. The RM10,000 was for expenses for her to move down to Kuala Lumpur to set up home there. This sum (which she received) was a consideration and not a refundable deposit for the grant of the long term lease of 10 years, as the rent agreed was to be maintained at RM200 per mensem throughout the full term of 10 years. It was agreed between her and the plaintiff that all the aforesaid terms were to be reduced in writing. She was to get a solicitor to draw up the agreement. And, while she gave instructions to the solicitor at his office for preparation of same, the plaintiff was present. She did not know the lawyer personally. Neither she nor the plaintiff had asked for any amendments to P4 or the written agreement before it was signed on 26 December 1969.

She wrote a letter dated 20 December 1978 (Exh. P8) to the plaintiff because the 10 years lease was about to expire and she wanted to return to Bukit Mertajam to resume her business. On 6 August 1969 she had made it clear to the plaintiff that she wanted the said premises back on expiry of the 10 year lease, and that was what both of them had agreed. It was never agreed that she should refund the said consideration of RM10,000, and she had never agreed to give him a further 10 years lease of the said premises. Sometime in 1980, she made an application to the Penang Rent Tribunal for decontrol of the said premises under s. 24 of the Control of Rent Act 1964 as the tenancy had expired. However, the Rent Tribunal decided to adjourn the matter pending the decision of the High Court in the current proceedings.

At the commencement of her cross-examination by Mr Sharma the following documents on the Rent Tribunal proceedings were produced by consent:

(a) The sealed copy of the defendant's application to the Rent Tribunal of Penang No.5/80 together with the grounds, marked as D15A.

(b) The plaintiff's defence in the Tribunal hearing, marked as D15B.

(c) The Tribunal's decision, marked as D15C.

In her cross-examination she agreed she had not stated in D15A that she wanted the premises back to carry out her own business, but nevertheless she had instructed the solicitor who prepared the written agreement and P4 of her intention to return to continue the business. She agreed that at the Tribunal hearing it was the contention of the plaintiff that the tenancy had not come to an end. She had been staying in the said premises for about 20 years before it was let out to the plaintiff. She was a trained tailor and had certificates to show. She operated her tailoring business under the style of Messrs Ling Ling Lady Dressers, which was registered under the Registration of Businesses Ordinance. She said the plaintiff had asked to be allowed to move into the said premises about one month before the written agreement and P4 was signed and all the terms agreed upon on 6 August 1969 between her and the plaintiff were faithfully incorporated in the written agreement.

After her evidence the defendant closed her case.

The examination and cross-examination of the plaintiff and the defendant also covered several side issues, which fizzled out and were not taken as the trial progressed towards conclusion. There are in the main only four issues of fact and law involved in this case, namely:

1) The credibility of the plaintiff's contention that the defendant had, on 6 August 1969, before execution of the written agreement and P4, orally agreed (in terms at variance or in conflict with the written agreement and P4) to give him a second 10 year lease with a monthly tenancy thereafter.

2) Even if the Court's finding on 1 above is in the plaintiff's favour, are the terms of the oral (tenancy) agreement admissible in view of the provisions of ss. 91 and 92 of the Evidence Act.

3) Whether the plaintiff was at all material times and is until now a protected tenant under the Control of Rent Act, 1966 (the Act) by virtue of the fact that the said premises remained a controlled premises at all times; and, the corollary question to pose being whether a fixed term tenancy agreement in respect of premises that comes within the purview of the Act, is permissible;

4) Whether the plaintiff was able to establish fraud alleged; and the standard of proof required.

On the 1st Issue

Though the defendant had appeared rather confused while giving evidence (her age and the fact that the incident took place over 25 years ago before the trial of the matter ought to be taken into account) on the balance of probabilities the Court accepts the defendant's version that the tenancy agreement was for a period of 10 years and no more. I find that the alleged further (second) 10 year lease and the monthly tenancy thereafter was an unadulterated fabrication by the plaintiff in order to hold on to the occupation of the premises beyond the fixed term of 10 years lease that he had agreed. I shall now state my reasons:

Clause 5 of the tenancy agreement which states "...the Lessor shall be entitled to keep the signboard displayed on the front of the said premises...", shows that the defendant had the intention of resuming her business upon her return from Kuala Lumpur at the expiry of the fixed term lease of 10 years. It is not without significance that towards the end of this period of fixed term lease the plaintiff himself wrote a letter dated 13 December 1978 (exh.P7) enquiring how much increase in rent on the said premises the defendant wanted. Such enquiry was entirely unnecessary if his tenancy had then more than 10 years to run. Indeed, if there was such oral agreement to give him 20 years plus monthly tenancy, it stands to reason that he would have written - if at all - to require, as of right, the defendant to effect and to register the second 10 years lease. As it turned out, the defendant wrote to the plaintiff the said letter dated 20 December 1978 (P8) offering to let the plaintiff have a further term of 3 years, but at an increased monthly rental of RM1,000. It is to be noted that it was only 3 months following receipt of exhibit P8 from the defendant, that the plaintiff raised - in his letter dated 1 March 1979 (Exh. P9) - for the first time, the issue of the 2nd ten years lease coupled with the contention that there was an oral agreement to that effect. Even then, there was no mention of the question of the monthly tenancy to continue thereafter.

He admitted in cross-examination that the first time the issue regarding a further tenancy was raised was when he wrote P9, and not earlier. He further said that despite being then aware that the premises came within the ambit of the Act, he had nevertheless insisted on a written agreement because, to quote: "....as a businessman I wanted to feel secure". This assertion clearly militates and tells against his statement in cross-examination that: "I did not request for the further 10 years to be incorporated into the agreement **or into some other form of an agreement....** because she asked me to trust her... though I personally do not trust her." It was also the plaintiff's story that only the initial period of 10 years was stated in the lease because the defendant had to obtain the signature and consent of the chargee of the title relating to the premises, yet this assertion saw the light of day only during the course of the trial, and was not pleaded in his original or amended statement of claim under particulars of fraud or anywhere in his pleadings.

The contents of the written agreement and P4 is unassailable, as the plaintiff had also stated in cross-examination that he was aware of and saw the 10 year period stated therein, in as much as the terms of same were explained to him, and neither of them had asked for any amendments therein before they signed same. Even had the plaintiff been ignorant of the language and not fully aware of their contents, in the absence of misrepresentation or fraud, the documents remain valid and binding. (See *Subramaniam v. Retnam* [1966] 1 MLJ 172 - in which case the defendant was ignorant of the English language).

For all the above reasons, the Court could not but come to the conclusion that the idea of the second 10 years lease must have been conceived and taken root in the plaintiff's fertile mind when he became wiser after his abortive attempt to secure an extension of the said fixed term lease.

The plaintiff had further contended that in the alleged oral agreement the defendant had agreed to let him continue his tenancy on a monthly basis after expiry of the alleged 20 years fixed term tenancy. This is a rather unfortunate assertion by the plaintiff, which casts a poor reflection on his creditworthiness as a witness. His statement of claim filed in 1979 and his defence (P15(B)) in the 1980 Rent Tribunal proceedings contained no express or implied mention of this issue. As I have said earlier in this judgment, this question of his right to a monthly tenancy was first raised only on 20 April 1993 in his application to amend his statement of claim. Thus, it is clear beyond doubt that the plaintiff's claim to the right to a

monthly tenancy after the expiration of the alleged 20 years lease must have been an afterthought when he realised that, even had he succeeded in this suit, his maximum claim of 20 years tenancy would have been fully utilised due to the lapse of 14 years pending trial of this matter.

As such, here again, the plaintiff's barefaced, blatant ploy to continue to remain in the premises (by the belated amendment to include his claim to a monthly tenancy) flies in the face of facts and is dishonest and deplorable to say the least. Neither should Counsel assist nor the Court condone such patently outrageous conduct by any party in a case before a Court of law. Be it noted that Counsel are not to act merely on instructions *a la* robots, in the form of data fed unto them, but indeed, as officers of the Court, they carry with them the added responsibility to sieve and vet instructions thrown at them by their clients and to submit to Court only issues that are squarely based on facts. Counsel who assist their clients to fabricate a cause of action forfeits a treasured piece of their character and integrity, before the presiding Judge at the trial, and also in the eyes of their peers upon publication of the judgment on the matter.

Another striking feature of the plaintiff's evidence is when he said "I required the said premises on the monthly basis for as long as I carry on my business....but according to the defendant, the chargee would not agree if I am given a monthly tenancy." By this he clearly meant that a monthly tenancy (on a rent controlled basis) was orally agreed upon, whereas the 10 years lease was only a superficial document prepared for sight and satisfaction of the chargee. Yet in his pleadings (vide clause 4(A) of the amended statement of claim) he had categorically averred that the tenancy orally agreed upon on 6 August 1969 was for a fixed term of 20 years commencing from 1 November 1969 and terminating on 31 October 1989, in two separate 10 years leases to be registered under the National Land Code. It can thus be observed that his pleadings and the main thrust of his evidence were materially at variance on this score.

In the event, on the evidence I had before me and on the balance of probabilities I find that neither on 6 August 1969 nor at any time thereafter did the defendant make any oral promise to grant the plaintiff any term of lease that was in excess of the terms stated in the written agreement and P4.

I further find that the RM10,000 paid by the plaintiff to the defendant, was paid, not as a deposit but as a consideration for the defendant agreeing to bind herself to a fixed term tenancy of 10 years, at a constant rental which was registered against her title. This must have been so, because the plaintiff himself had testified that "I did not want her to let it out to others...I needed it badly." At any rate, this question of whether RM10,000 paid to the defendant was a refundable deposit or a consideration, was a non-issue as the plaintiff in his pleadings did not claim the refund of same.

On the 2nd Issue

Even if I had found in the Plaintiff's favour on the first issue, yet unless I also find that the contents of the written agreement and P4 were a sham and the parties had no intention of complying with their terms, the plaintiff is nevertheless caught by the provisions of ss. 91 and 92 of the Evidence Act 1950. The English case of *John Pym v Robert Campbelld & Ors* [1856] 119 ER 903 specifically dealt with the operation of the provisions of ss. 91 and 92 (cited with approval in *Tygarajah Mudaliar v. Vedathanni* [1936] MLJ 79 PC). In that case, Erle J said at page 82:

> ...the production of a paper purporting to be an agreement by a party with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *animo contrahendi* (the intention of not contradicting), the terms contained in it are conclusive and cannot be varied by parole evidence but if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.

In the current case, there was ample evidence that the parties had intended the written agreement to operate, considering that there was manifest compliance by both parties with the terms contained therein, to wit; the plaintiff had been paying the rent of RM200 per mensem for 10 years; the first month's rental was w.e.f. 1 November 1969 (vide rental receipt Exh. P5(a)); the defendant had been consistently paying the Quit Rent and Assessment; the said premises was not sublet during the 10 years term; and soon after the expiry of the 10 years lease the defendant took action against the plaintiff for vacant possession.

In *Arrale v Costain Civil Engineer* [1976] 1 Lloyd's Rep 98, Stephenson LJ suggested that evidence of negotiations could be admitted in order to clarify ambiguities. This suggestion was followed by Kerr J in the '*Karen Oltmann*' [1976] 2 Lloyd's Rep 708 in the following terms:

> If a contract contains words which, are fairly capable of bearing more than one meaning, and if it is being alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the Court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the word as the result of their common intention.

In the present case, the written agreement and P4 contains no ambiguity. Indeed, its provisions are crystal clear and the parties have evidently and plainly acted upon it.

Section 91 of the Evidence Act provides that when the terms of a contract "have been reduced **by the consent of the parties** to the form of a document and in all cases in which any matter **is required by law to be reduced to the form of a document,** no evidence shall be given in proof of the terms of the contract ... except the document itself..." and s. 92 adds that oral evidence is inadmissible to vary or modify the terms of a written agreement. The parties here had consented to have their tenancy agreement being reduced to the form of a document and registered as required by s. 221 of the National Land Code 1965 (for being a tenancy of more than 3 years). Thus, the plaintiff's oral evidence to vary the terms of the written (tenancy) agreement and P4 is clearly not admissible as it falls foul of the provisions of ss. 91 and 92 of the Evidence Act. (See *Voo Min En & Ors v. Leong Chung Fatt* [1982] 2 MLJ 241 and *Leong Gan & Ors v. Tan Chong Motor Co. Ltd* [1969] 2 MLJ 9.

Indeed, upon the authority of the principle enunciated in *United Malayan Banking Corporation Bhd v. Tan Lian Keng & Ors* [1990] 1 MLJ 280, even if the alleged oral agreement is admitted by the parties, the Court should not allow itself to be influenced by the evidence in its construction of the written agreement save, in my view, for the purpose of resolving ambiguities.

On the Third Issue

Unfortunately, the trial of this case has taken this Court through the aggregate of five whole days of hearing when it ought to have taken only half a day, as, in my opinion, this third issue is probably the only real issue that warrants the plaintiff's bite and the Court's curial attention.

It is common ground that the premises concerned was at all material times and still continues to be subject to the Control of Rent Act 1966. Though, Mr Sharma for the plaintiff conceded that a fixed term tenancy is permissible under the Control of Rent Act 1966, yet he had contended that because it is a controlled premises, the ambit of the Court's jurisdiction to make an order or give judgment for the recovery or possession of any controlled premises is only restricted to any of the cases prescribed under section 16 of the Act. According to him, the only provision that may be available to the defendant here is Section 16(1)(b) of the Act, which provides for applications for recovery of possession "where any obligation of the tenancy ....so far as the obligation is consistent with this Act, has been broken or not performed by the tenant...". It was his contention that section 16(1)(b) could apply only if the covenant in the agreement allegedly breached is consistent with the provisions of the Act, and he further contended that clause 2(e) of the written agreement (which states that the plaintiff shall hand over possession of the said premises to the defendant on the expiration of the term created) clashes with this provision of the Act; clause 2(e) thereby made the written tenancy agreement illegal, null and void. I disagree. The question whether clause 2(e) runs foul of the provisions of the Act is essentially dependent on this Court's determination of the concommittant question of whether generally, the Act debars the making of fixed term tenancy agreements. This question merits anxious consideration. To consider this, it is pertinent to examine the wording of s. 24(1)(a) of the Act which reads:

> (a) where the tenancy of any controlled premises, being a **tenancy for a fixed period** and other than a monthly tenancy, has been determined either by **effluxion of time** or by any other means whatsoever; or .... the landlord thereof may apply to the Tribunal **requiring the latter** to issue a certificate stating either or both of the facts referred to in this subsection, and upon the issue of such certificate a copy thereof shall be served on the tenant.

Despite some research on this point, I have been unable to locate any Malaysian case authority containing categorical dicta to the effect that a fixed term tenancy of a controlled premises does not fall foul of the Act (a nagging question often raised), safe by implication (by absence of any adverse comments against fixed term tenancies) in a line of cases namely, *Low Kam Yuen v Teh Kim Huah* [1979] 1 MLJ 83, *Soong Ah Chow (f) & Anor v. Lai Kok Cheng* [1984] 1 CLJ 152 and *United India Fire and General Insurance v. Jeffnese Cooperative Society* [1971] 1 MLJ 118. There is good reason for this absence of dicta against fixed term tenancies of controlled premises. To deliberate on this point, it is essential to carefully study the peculiar wording of s. 24(1)(a) of the Act itself, wherein the expression "tenancy for a fixed period...has been determined by effluxion of time or ..." would indicate by implication, the legislature's recognition of fixed term tenancies, and such tenancies cannot therefore be inconsistent with or nullified by the Act.

Be that as it may, the present case concerned a fixed term tenancy whereby the lease period had been precisely stated to commence on 1 November 1969 and to expire on 31 October 1979 (see clause 2 of P4 in the statutory Form 15A registered under s. 221 of the National Land Code 1965.) In my view, in such a tenancy agreement where its duration is clearly stated, the incorporation of a covenant to hand over vacant possession upon its determination by effluxion of time, is not strictly essential and its absence is not fatal because in any event a lease where the duration is so clearly - nay precisely - stated, obliges the tenant to give up vacant possession of the premises upon expiry of the period that he had bargained for; he is clearly estopped by contract from claiming that the term granted to him is longer than the actual term that he had agreed to.

I shall now turn to the other problem, of the effect of s. 24(2) of the Act as applied to the current situation in the present case, namely: what happens to a tenant of a fixed term tenancy of a controlled premises which has not been decontrolled, upon the determination of his tenancy by effuxion of time? The problem is apparent rather than real. This provision reads: **"Upon the service** on the tenant of a copy of such certificate (of decontrol), the premises concerned shall forthwith cease to be controlled premises **and any person holding on after** such cessation shall cease to enjoy the benefits and protection which he would otherwise have enjoyed under this Act but for such cessation".

The defendant had applied to decontrol the premises but the Rent Tribunal had deferred its decision pending the outcome of the current proceedings before me. There, it was decided thus:

> The Tribunal is of the view that on the evidence above there are issues of fact which should be decided by the High Court first and that there are difficult issues of law which the Tribunal have no jurisdiction to decide on.
>
> On the particular facts and circumstances of this case the Tribunal holds that it has no jurisdiction to hear this application.
>
> If it is wrong in so ruling, the Tribunal is of the view and so holds that the application should be adjourned pending the decision of the High Court.

It is common ground that until today no certificate of decontrol has yet been issued or served in respect of the said premises. Be it noted that prior to 1966 Act a tenant in possession of a controlled premises after the determination of his tenancy cannot be deprived of possession of same by the landlord, as, by virtue of s. 15 of the Control of Rent Ordinance 1948 he assumes protection as "a statutory tenant". (See *Ramasamy Pillai v. Meyappa Chettiar* [1955] 21 MLJ 105, and *Syed Ahmed Al-Junied & Ors v. Reshty* [1969] 1 MLJ PC wherein ss. 15 and 27 of the old Ordinance was considered and applied). However in the landmark case of *United India Fire and General Insurance v. Jaffnese Cooperative Society* [1971] 1 MLJ 118, it was held that the effect of the 1966 Rent Act was to abolish statutory tenancy as the landlord is entitled as of right to a certificate of decontrol by virtue of s. 23(1)(a) or (b) (now ss. 24(1)(a) and (b) of the Act) and the Rent Tribunal is left with no discretion but is required to issue a certificate upon proof of the event in either s. 23(1)(a) or (b).

Thus, the real question devolves to: whether the plaintiff though not being a statutory tenant, could still claim protection under the Act after the determination by effluxion of time, of his 10 years fixed tenancy on the grounds that he has not been served with a certificate of decontrol under s. 24(2) of the Act. In my view, an occupant of a controlled premises would be able to claim such protection if - and only if - after the expiry of a fixed term tenancy period, the landlord had accepted any rent from such occupant while the premises remained controlled premises. See *Hong Kong and Shanghai Banking Corporation Ipoh v. Rent Tribunal for Ulu Kinta and Others* [1972] 1 MLJ 70. As such, until the landlord commits the act of accepting rent from the tenant after expiry of the fixed tenancy period, the tenant is estopped by force of the contract, from contending that his fixed term period of tenancy has not been determined and he could continue to be in occupation. The contract which he had voluntarily entered into is binding upon him *in personam* whereas the service (not strictly essential) of the certificate of decontrol on him - should he still continue to occupy the premises - is only a procedure affecting the premises *in rem*. To put it rather bluntly, he only assumes the role of a mere postbox - so to say - and nothing more, for the purpose of the landlord's application to convert a controlled premises to that of a decontrolled premises under s. 24(2) of the Act.

Perhaps, it could be easier on the mind if we could conceptualise thus: until decontrolled pursuant to s. 24 of the Act a premises that came within the definition in s. 4 of the Act, remained a controlled premises, even if it contained no occupants and is completely vacant (the statutory position of the premises *in rem*). Whereas, it is trite law that an occupant of a controlled premises could claim protection under the Act only if he acquires the status of a tenant under certain conditions e.g. payment of rental and acknowledgment of his tenancy by the landlord (his statutory right *in personam*). Until he acquires that status, an occupier is nothing but a mere trespasser of the controlled premises. Clearly, the tenant and the premises ought to be treated as distinct and separate entities.

In the current case, not only did the defendant refuse to accept any rental after the determination of the fixed term tenancy of 10 years - and as the result no new tenancy had been created [see *Soong Ah Chow (f) & Anor v. Lai Kok Cheng* [1984] 1 CLJ 152] - but the plaintiff's tendering of rent to the defendant in the form of cheques is in any event not good tender, in the absence of an agreement to that effect, even if there had been previous acceptance of cheques by the defendant in payment. See *H. Mohamed Salleh v. Ang Chan Siong* [1949] 15 MLJ 35. Thus, I hold that no fresh tenancy had been created after the expiry of the fixed period of 10 years, and the plaintiff could not - even on this further point - thereby claim any protection under the Act.

On the Fourth Issue:

Only for completeness, need this issue be considered. Fraud raised in civil proceedings requires a higher standard of proof than that in ordinary matters. (See *Nahar Singh v. Pang Hon Chin* [1986] 2 MLJ 141). Fraud in civil proceedings must be proved by a preponderance of probability and not on a balance of probability. The degree of proof need not reach certainty but it must carry a very high degree of probability. What it means is that the evidence adduced is such that the Court believes its existence or a prudent man considers its existence very highly probable in the circumstances of the particular case. See *Chu Choon Moi v. Ngan Sew Tin* [1986] 1 MLJ 34. Also, it is settled that he who alleges fraud must clearly and distinctly prove it. It can never be based on suspicion and conjecture.

Fraud, in order to succeed must be brought home to the party alleged of having committed fraud. Fraud should be such that the desired object of the alleged act is to cheat a man of his existing right; it should be actual and not constructive fraud, it should be dishonesty of some sort in which he is a party or privy and it implies a dishonest and wilful act on his part to cheat a man of a known right. See *Tai Lee Finance v. Official Assignee & Ors* [1983] 1 MLJ 81, *Waimiha's Sawmilling Co Ltd v. Waione Timber Company Ltd* [1926] AC 101. That a high degree of dishonesty and wilfulness in the act is required to be proved, is well illustrated in *Waimiha's* case (*ibid*), where the Privy Council held that there was no fraud on the part of the registered proprietor in merely acquiring title with notice of an existing unregistered interest or in taking a transfer with knowledge that its registration will defeat such an interest. (See also *Mills v. Stokman* [1967] 116 CLR 61).

In the case at hand, the plaintiff had alleged that there was fraud in that the defendant, by having accepted RM10,000 cash payment, and knowing that under the terms of the (alleged) oral tenancy agreement the plaintiff had a further ten (10) years lease and more to run, she had nevertheless devised a scheme to refuse to grant the further term as agreed, by contending that there was no oral agreement to this effect.

This allegation, couched as it does in a peculiar and convoluted manner, does not even come anywhere near to constitute an allegation of fraud. It therefore does not merit my consideration. Further, the sum total of the allegation contained merely a general allegation of fraud and the pleadings stand mute as to the circumstances relied upon as constituting the alleged fraud. A general allegation of fraud is insufficient even to amount to an averment of fraud of the kind that the Court ought to take notice of.

In the event, having regard to my conclusions after carefully considering the facts and the law as detailed above, I find a preponderance of evidence and law in favour of the Defendant's case. The Plaintiff's claim in this suit is dismissed and the Defendant's action in the Lower Court is allowed as prayed in the following terms:

(i) The plaintiff shall surrender vacant possession of premises No.14 Straight Street, Bukit Mertajam, Province Wellesley on or before 30 November 1994;

(ii) The plaintiff is condemned to pay the defendant mesne profits at the rate of RM400 per month in terms of double rent from 1 November 1979 until he surrenders vacant possession, by virtue of s. 28(4)(a) of the Civil Law Act 1956;

(iii) Costs is also awarded to the defendant in the High Court as well as in the lower Court proceedings.

As it has been clearly shown from the facts laid before me that the plaintiff had overstayed his rights for the period of over 14 years (through no fault of the defendant who had promptly instituted action upon the expiry of the fixed term lease) it would cause grave injustice to the defendant to defer her rightful claim to the fruits of litigation by allowing the plaintiff more than the period I have allowed for him to quit. This period I have allowed after having considered the fact that he runs a business and would require time to relocate same. Regretably, the plaintiff had this period of well over a decade in which to look for alternative business premises, but had instead chosen to hold on to the said premises tenaciously and illegally for the whole span of 14 years, all the while only tendering cheques (unrealised) for rental.